88-320

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS ROBERT KAMMER,

Appellant,

v.

CHRISTINE J. YOUNG,

Appellee.

ON APPEAL FROM THE
COURT OF SPECIAL APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

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a. **Question Presented**

Did the admission into evidence at trial that the "statistical probability" of appellant's paternity was "99.78%", as permitted by the Maryland Code, Family Law Article, section 5-1029, violate appellant's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution?

b. **List of all Parties to the Proceeding**

1. Thomas Robert Kammer, appellant
2. Christine J. Young, appellee

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d. **Reference to Prior Opinions**

June 9, 1983 - Opinion of the Circuit Court for Baltimore City excluding the blood test evidence at the trial of this case.

March 5, 1984 - Opinion of the Circuit Court for Baltimore City permitting introduction of the blood test evidence at trial.

April 4, 1986 - Entry of "Decree Determining Paternity" by the Circuit Court for Baltimore City.

May 7, 1986 - Entry of "Modified Paternity Decree" by the Circuit Court for Baltimore City.

January 13, 1988 - Opinion of the Court of Special Appeals of Maryland affirming the judgments of the Circuit Court for Baltimore City, dated April 4, 1986 and May 7, 1986, reported at 78 Md.App. 565, 535 A.2d 936 (1988).

February 16, 1988 - Issuance of the Mandate of the Court of Special

Appeals of Maryland.

May 31, 1988 - Order of the Court of Appeals of Maryland denying Petition for Writ of Certiorari.

e. Jurisdictional Grounds

Appellant seeks review of the paternity judgments of the Circuit Court for Baltimore City dated April 4, 1986 and May 7, 1986 which judgments were affirmed by the Court of Special Appeals of Maryland on January 13, 1988, further review being denied by the Court of Appeals of Maryland by order dated May 31, 1988. A Notice of Appeal to this Court was filed by appellant in the Court of Special Appeals of Maryland and with the Circuit Court for Baltimore City on August 12, 1988. Review is proper pursuant to the provisions of 28 U.S.C. Section 1257(2) on the ground that evidence entered against appellant at trial,

as permitted by the Maryland Code, Family Law Article, Section 5-1029, violates due process of law and accordingly is repugnant to the Constitution of the United States, as amended.

f. Applicable Constitutional Provisions and Statutes

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution,

Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Maryland Code, Family Law Article

Section 5-1029:

> (a) In general. - On the motion a party to the proceeding or on its own motion, the court shall order the mother, child, and alleged father to submit to blood tests to determine whether the alleged father can be excluded as being the father of the child.
> (b) Approved laboratory required. - The blood tests shall be made in a laboratory selected by the court from a list of laboratories provided by the Administration.
> (c) Form of results. - The labor-

atory shall report the results of each blood test in writing and in the form the court requires.

(d) Copies of results. - A copy of the results of each blood test shall be provided to the parties or their counsel in the manner that the court directs.

(e) Results as evidence. - (1) The results of each blood test shall be received in evidence if: (i) definite exclusion is established; or (ii) the testing is sufficiently extensive to exclude 97.3% of alleged fathers who are not biological fathers, and the statistical probability of the alleged father's paternity is at least 97.3%.

(2) A laboratory report is prima facie evidence of the results of a blood test.

(3) If a laboratory report is admitted in evidence, the laboratory technician who made the test is subject to cross-examination by any party to the proceeding.

g. **Statement of the Case**

This case involves an allegation of paternity by appellee, Christine J. Young. Appellee instituted paternity proceedings in the Circuit Court for Baltimore City (hereinafter referred to

as "the Circuit Court") seeking a determination that appellant was the father of a child born to appellee on May 24, 1982 and also requesting an order requiring appellant to pay child support pursuant to that determination.

Maryland's paternity statute permits the inclusionary results of blood tests to be admitted into evidence against a putative father in a paternity case provided that the "statistical probability of the alleged father's paternity is at least 97.3%". Prior to trial on the merits in this case, the Circuit Court entered an order requiring the parties, and the minor child, to submit to a blood test pursuant to the provisions of the Maryland statute set forth above. The laboratory performing the test interpreted the same and produced a written report dated November 12, 1982 stating that the "plausibility of

[appellant's] paternity = 99.78%" [see Apx. 102-103].

Prior to trial, appellant filed a "Motion for Pretrial Determination of Admissibility of Blood Tests" which sought the exclusion of the blood test interpretation at trial. After a three-day evidentiary hearing, that motion was granted [see Apx. 1, ruling of Judge J. Owen Wise dated June 9, 1983]. Pretrial proceedings established that the laboratory interpretation of the blood test evidence utilized "Bayes' Theorem", a formula of probability theory which is used to combine quantitative medical evidence with all other non-medical evidence in the case to deduce one overall probability of paternity. See Ellman and Kaye, Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?,

54 N.Y.U.L.Rev. 1131 (1979).[1] In order to establish a scientifically valid "statistical probability of paternity", it is necessary to have both the "posterior probability" and the "prior probability" in order to make the necessary computations pursuant to the formula. The raw blood test data constitutes the "posterior probability". However, the non-genetic evidence, i.e., the chance that the defendant is really the father, is obviously unknown to the laboratory. The laboratory has no accurate data upon which to ascertain the "prior probability" that the alleged father is, in fact, the actual father. Accordingly, blood testing laboratories routinely utilize and incorporate an assumed "prior

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[1] Counsel respectfully submits that the reading of this well researched article is essential for a full understanding of the statistical theory and the legal issues raised by this case.

probability" of one-half or .5 into the equation called for by Bayes' Theorem. As Ellman and Kaye, supra, note:

> Since Bayes' Theorem is the accepted mathematical technique for calculating conditional probabilities, it is not surprising that it has been employed by experts testifying in recent paternity disputes. It is surprising, however, that the currently accepted technique allows the expert to make his own undisclosed estimate of the prior probability in order to arrive at the probability of paternity he presents to the jury. For instance, the expert who testified for the prosecution in Cramer v. Morrison [88 Cal. App. 3d 873, 153 Cal. Rptr. 865 (1979)] routinely calculates his "probability of paternity" by assuming that the non-test evidence establishes a 50% chance that the defendant is the father [citation omitted]. This is the equivalent to supposing that the universe of possible fathers is already reduced to two equally likely suspects before considering the HLA test results. As the application of Bayes' Theorem shows, making such an assumption insures that in every

> case in which any recognized blood test does not exclude the defendant, one will find that he is probably the father, thus satisfying the burden of proof in civil cases [citation omitted]. It is apparent from the court's opinion in Cramer that it did not understand that such an assumption had been made [citation omitted], nor have other courts displayed an awareness on this point.
>
> There seems to be no basis for the blanket assumption that the prior probability is one-half. 54 N.Y.U.L.Rev. 1131, 1149-1150.

Petitioner submits that the unwarranted assumption of the "prior probability" in Bayes' Theorem, utilized by the blood test laboratory in this case, was an essential predicate upon which the trial court judge initially suppressed the result.

When the case was initially called for trial, the Circuit Court (Judge Joseph H. H. Kaplan) indicated an intention to reconsider the earlier ruling

suppressing the test. After further pretrial proceedings, appellant filed a "Supplemental Motion for Pretrial Determination of Blood Tests and for Other Appropriate Relief" arguing that the admission of the interpretation of the blood test results, before a jury, which was predicated upon the assumed prior probability and which represented that appellant's "probability of paternity" as "99.78%", offended due process of law and denied a fair trial in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Appellant's Supplemental Motion was denied and the Circuit Court ruled that the blood test interpretation would be admissible at appellant's trial.

At trial, appellant objected to the introduction of the blood test and its interpretation before the jury:

THE COURT: I read the file.

I told you I would and I did. I read the entire proceedings of this case other than the entire testimony before Judge Wise because it's 200 pages, but I read the pertinent parts of that testimony which was germane to the issue as to the admissibility of the results of the laboratory test, the blood test.

MR. BARNES: Right.

THE COURT: Now, what you want me to do now I assume is to rule on the same subject matter before it gets before the jury.

MR. BARNES: Not exactly.

* * *

MR. BARNES: I want to be clear.

THE COURT: Be very clear.

MR. BARNES: Number one, I have raised the point to you that if this test comes in we may as well forget it because the test number overwhelms the jury and violates fundamental fairness, due process of law under Article 23 and Article 24 of the Maryland Declaration of Rights and the Fifth and Fourteenth Amendments of the United States Constitution. It is written about in the literature that counsel has even put in as evidence before the Court in this case that it has consti-

tutional problems.

I say to admit this test, irrespective of compliance with the statute, violates the constitutional rights of the defendant in this case and I move to exclude it now.

THE COURT: Uh-huh.

* * *

MR. BARNES: I'm talking about two different planes. The Constitutional argument I am making--

THE COURT: I understand that but I am not going to rehash the constitutional argument because you did that before Judge Kaplan. What I am saying is will you agree that the blood testing procedures set forth in the statute are admissible, the procedures?

MR. BARNES: I am saying not under constitutional basis.

THE COURT: You are saying it is not admissible. Is that what you are telling me?

MR. BARNES: Yes, sir.

THE COURT: I don't agree with that. I do not agree with that. I think it is admissible without any question.

* * *

MR. MOSS: Okay. At this time I will offer the blood test into evidence as petitioner's exhibit 6.

MR. BARNES: Okay, and I object on all the grounds previously cited to the Court.

THE COURT: Overruled. Put it in.

* * *

Both in the pre-trial proceedings, and at trial, appellant called Gary A. Chase, Ph.D. as a witness concerning the statistical interpretation of the blood test results performed by the laboratory. Dr. Chase has been employed by Johns Hopkins University for seventeen years and he is presently an associate professor at the Johns Hopkins University School of Hygiene and Public Health and at the School of Medicine. Dr. Chase was a national merit scholar, a magnum cum laude graduate of Harvard University with

a degree in biochemical sciences and a minor in mathematics. He received a Ph.D. in probability and statistics from Johns Hopkins University in 1970. Dr. Chase has had extensive exposure to statistical genetics in his post-doctorate work at Hopkins and he has also been president of the Maryland Chapter of the American Statistics Association. He was an investigator in genetic statistics sponsored by the Howard Hughes Medical Institute from 1973 to 1977 and had National Institute of Health pre-doctoral and post-doctoral fellowships in the subject of human genetics. His curriculum vitae reflects an extensive bibliography with over fifty articles published regarding human genetics, including articles on the HLA system and the interpretation of data which is derived therefrom. The trial court qualified the doctor as an expert in statistics and

probability, statistical methods in human genetics and the interpretation of evidence from paternity testing.

In both the pre-trial and trial proceedings before the Circuit Court, Dr. Chase emphasized that the appellee's blood test report, and corresponding testimony in support thereof, did not state a "statistical probability of paternity". He contradicted "very strongly" the lab technician's testimony that the assumed prior probability of .5 was "neutral" - an assumption which Dr. Chase characterized as a "highly prejudicial assumption to the defendant" and "an example of how science can be used to hurt people". Dr. Chase testified that the methodology of using an assumed prior probability is not accepted by the scientists in the field of probability and statistics and that the only community accepting this approach is the community

of blood banking and paternity testing people - those who generally do not hold any degrees from institutions of higher learning and do not have any training, education or experience in the advanced fields of probability and statistics.

In the pre-trial suppression hearing, Mrs. Margaret Brooks, one of the laboratory technicians offered as a witness by appellee, testified as follows:

> Q - Mrs. Brooks, you know what a hypothetical question is?
>
> A - I think so.
>
> Q - Alright. I'm going to ask you one. If the accused father was in prison or known by absolutely uncontroverted fact to be isolated from the plaintiff-petitioner, the mother, during the relevant period of time in which she conceived the child that would be the subject of the paternity dispute, would you still use a prior probability of 0.5?

A - No. If someone asked me to calculate a prior probability giving me that information specifically, it would be possible to alter the prior probability incorporated in the equation.

Q - But without investigation you would use 0.5 would you not?

A - Without investigation, I would use 0.5 because it is a neutral prior probability.

Q - And therefore the accused father who was in prison or known of uncontroverted fact by some other means other than your blood test could be found by your test to be the father, could he not?

* * *

THE COURT: Given the hypothetical, the man could still be determiend to be the father?

THE WITNESS: Oh, could be? Yes, he could be.

* * *

At trial, appellee's counsel, again and again, paraded large charts and exhibits emphasizing to the jury that the

"statistical probability" of appellant's paternity was "99.78%".

Appellant testified at trial in his own defense that he had not had sexual relations with the appellee during the month which she became pregnant (August, 1981) or, for that matter, at any time after December, 1980.[2] Appellee offered no evidence that petitioner had ever admitted that he was the father of the child or had admitted to having sexual relations with the appellee during the period in which she became pregnant.

In addition to appellant's vehement denial of sexual relations with appellee, and of his paternity, there was additional evidence in the case that appellee had had a suspicious relationship with another adult male (Klouser) at the time

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[2] Based upon appellant's testimony, the "prior probability" of his paternity would be zero.

that she became pregnant. The trial court refused to admit evidence that Klouser, who was deceased at the time of trial, told appellant's sister that he had had a sexual relationship with the appellee in August, 1981 and stated that he could have easily been the father of appellee's child.

At the conclusion of the evidence at trial, the trial court instructed the jury that the blood test results were admissible if "the statistical probability of the alleged father's paternity is at least 97.3%" and that "a laboratory report is prima facie evidence of results of a blood test". The jury determined that the appellant was the father of appellee's child and the court entered judgments on those verdicts. (See Apx. 44 and Apx. 46).

Appellant entered an appeal to the Court of Special Appeals of Maryland,

arguing, among other issues, that the introduction of the interpretation of the blood test evidence violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution. That court affirmed the judgment finding that no constitutional violations had occurred. (Apx. 51). Appellant filed a petition for a Writ of Certiorari to the Court of Appeals of Maryland raising the issue as to whether the introduction of the test results violated his rights to due process of law and to the right to trial by jury. That court denied the petition. (Apx. 98).

h. **Argument in Support of Plenary Consideration**

Appellant has been wrongly determined to be the father of appellee's child, notwithstanding the opinions of laboratory technicians that the "statis-

tical probability" of his paternity is "99.78%". It is undeniable that the pronouncement of such a high "statistical probability" is compelling, particularly to those laymen, lawyers and judges unsophisticated in the field of probability and statistics. However, if this Court were to permit full briefing and oral argument, the record would show the illusory nature of the blood test evidence offered against Mr. Kammer.

Appellant submits that the aura of authenticity and reliability emanated by the statistical pronouncement of appellant's alleged paternity seems to have prevented the lower courts from fairly evaluating both the veracity of the statistical methodology used and the prejudicial impact of that methodology on appellant. The courts below, in essence, have ruled that <u>it doesn't matter</u> that

the scientific theory utilized by the blood test laboratory has been misapplied or that it is not accepted by the relevant scientific community of genetic biostatisticians. The Maryland courts have found the procedures of the laboratory acceptable, under the guise of statutory construction, because the Maryland legislature heard only from representatives of the "blood banking" community. Full briefs and argument would disclose that the "blood bankers" are not scientists, but rather technicians, lacking formal education, experience and understanding in the field of probability and statistics. Current scientific knowledge and practice does not approve of the use of Bayes' Theorem in establishing a "probability of paternity". In their effort to uphold the Maryland statute, and the judgment rendered against appellant in this case,

the courts below have refused to accept the scientists' admonitions on this issue and have instead deferred to the "scientific community" of lab technicians. Such refusal has judicially ordained a scientifically invalid procedure, thereby permitting the use of unreliable and highly prejudicial evidence against appellant. The evidence is uncontradicted that an innocent father can be determined to have a "statistical probability" of paternity of "99.78%" - a proposition which appellant finds absurd in the extreme.

Even assuming that this Court accepts the use of an assumed fact in the use of Bayes' Theorem, appellant asserts that the introduction of statistical evidence at the trial of his case was sufficiently egregious as to constitute a violation of his rights to due process of law under the Fifth and Fourteenth Amend-

ments to the United States Constitution. Fundamental fairness demands the exclusion of inflammatory or highly prejudicial presentations of evidence before the factfinder. The lower courts in Maryland have shown no concern whatsoever with the exaggerated impact upon the jury of the statistical claims concerning the "probability" of appellant's paternity. Given the traditional concern about the exaggerated impact of statistical evidence on a jury, it is significant to note the complete absence of consideration given to an alternate, but less prejudicial, means of proof regarding the blood test evidence.

There is a dearth of case law on the issue as to whether the use of statistical probabilities in a trial constitutes a violation of due process of law. However, due to the growing practice of the use of such probabilities, and Bayes'

Theorem, it would certainly be appropriate and in the public interest for this Court to fully review this matter.

Counsel has not located any cases decided by this Court approving the use of statistical probabilities in the assessment of a party's liability or guilt. The few reported cases in this area have rejected the attempt to present statistical probabilities or other statistical conclusions on the ultimate issue before the jury. A leading case is People v. Collins, 66 Cal.Rptr. 497, 438 P.2d 33 (1968) in which the Supreme Court of California reversed a robbery conviction for improper use of statistical evidence. In Collins, as here, the expert statistical witness assumed a fact not in evidence. The Supreme Court of California found that the introduction and use of mathematical probability statistics injected two fundamental prejudicial

errors into the case: 1) the testimony lacked adequate foundation both in evidence and in statistical theory; and 2) the testimony distracted the jury from its proper and requisite function of weighing the evidence and encouraged the jurors to rely upon a logically irrelevant expert demonstration, putting the jury and the defendant at a disadvantage in sifting relevant fact from inapplicable theory.

As pointed out above, the assumption made by the laboratory in this case that the prior probability is fifty percent is not based on any fact in evidence and immediately puts the defendant at an unfair disadvantage if the blood test results are similar to that of the child whose paternity is in question. Furthermore, the distraction of the jury with statistical and mathematical evidence on the ultimate issue deprived appellant of

a fair trial. The statistical approach to the case distracted the jurors from weighing the evidence and determining the ultimate credibility of the plaintiff and the defendant on the ultimate issue of appellant's paternity. As the court in People v. Collins, supra, noted:

> Confronted with an equation which purports to yield a numerical index of probable guilt, few juries could resist the temptation to accord disproportionate weight to that index... 438 P.33, 40.

Appellant submits that the jury in this case was unquestionably overwhelmed by the testimony and exhibits that the "statistical probability" of his paternity was "99.78%". United States v. Massey, 594 F.2d 676 (8th Cir. 1979) also refused to accept mathematical evidence on the ultimate issue of criminal agency. The appellate court rejected as "speculative and confusing" the "statistical pro-

bability" that certain hair samples matched those of defendant, thereby circumstantially proving his guilt. The court relied upon State v. Carlson, 267 N.W.2d 170 (Minn. 1978) in which that court stated:

> Our concern over this evidence is...with its potentially exaggerated impact upon the trier of fact. Testimony expressing opinions or conclusions in terms of statistical probabilities can make the uncertain seem all but proven, and suggest, by quantification, satisfaction of the requirements that guilt be established "beyond a reasonable doubt". Diligent cross-examination may in some cases minimize statistical manipulation and confine the scope of probability testimony. We are not convinced, however, that such rebuttal would dispell the psychological impact of the suggestion of mathematical precision, and we share the concern for "the substantial unfairness to a defendant which may result from ill conceived techniques with which the trier of fact is not techniquely equipped to cope. 267 N.W.2 at 176 (citations and footnote omitted). [Emphasis added.]

In Dorsey v. State, 276 Md. 638, 350 A.2d 665 (1976), the Court of Appeals of Maryland rejected testimony by a detective stating the percentage of his arrests which resulted in conviction. Importantly, the court noted that:

> Even in those jurisdictions "in which the courts have ruled on the admissibility of [expert] statistical or mathematical evidence offered to show the probability that the defendant was, or was not, the person who committed the alleged crime, or that he was, or was not, connected with the criminal act in some way...the Court(s) [have] held that it was reversible error to permit an expert witness to [so] testify...". [Citations omitted.] 276 Md. 638, 644.

The case of Alinda V. v. Alfredo V., 125 Cal. App. 3d 98, 177 Cal.Rptr. 839 (1981) involved a paternity action in which the plaintiff-mother introduced an HLA test result that the statistical probability of the alleged father's paternity was 98.5%. The trial court rejected the

evidence and on appeal, the California Court of Appeal stated:

> There is a very material difference between the test result and the statistical result of probability of paternity. The evidence was uncontradicted that an HLA test could show that a defendant biologically could not be the father or it could show that a defendant is biologically within the class that could be the father. A blood test could not show that the defendant was the father.
>
> * * *
>
> The [trial] court, however, properly found that the statistical result of the test, which stated that there was a 98.5 percent probability of defendant's paternity of plaintiff was inaccurate and not entitled to any substantial evidentiary weight. The evidence was presented by the medical technologist from the University laboratory whose knowledge of the case was limited to the blood typing. She did not know the extent or nature of the other evidence to be introduced at trial, and she was not in a position to weigh the evidence and make a mathematical determination of the probability of paternity. The trial court's finding of fact

was correct. 125 Cal. App. 3d 98, 101. [Emphasis added.]

See also McCormick on Evidence, 2d Ed. (West, 1972), Section 204 entitled "The Theory of Probabilities as Applied to Questions of Identification" for an excellent discussion of the reported case law in this area.

Appellant respectfully asserts that the reasoning behind all of the reported decisions rejecting the attempt to quantify issues of proof into a "statistical probability is based upon the distrust for the reliability of that evidence and also the exaggerated impact upon the factfinder. This case exposes the flawed methodology inherent in the statistical presentation of the blood testing laboratory and clearly establishes substantial prejudice to the due process rights of appellant through the use of such evidence.

Conclusion

For all of the above reasons, this Court is urged to reverse the judgment of the Court of Special Appeals of Maryland and to remand the case to that court with directions to enter an order reversing the decrees of the Circuit Court for Baltimore City dated April 4, 1986 and May 7, 1986 and awarding appellant a new trial.